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09/747,529

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December 22, 2000

First Named Inventor

Sheppard, James M. Jr.

Art Unit

1771

Examiner Name

Befumo, Jenna-Leigh

Attorney Docket Number

2827

ENCLOSURES (Check all that apply)

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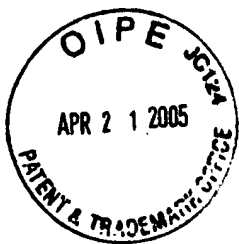
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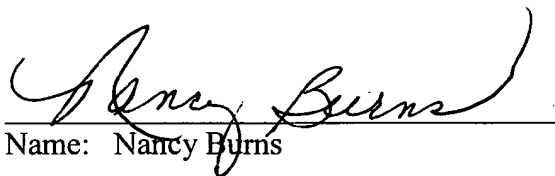
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Docket: 2827

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IN THE UNITED STATES
PATENT AND TRADEMARK OFFICE BEFORE THE
BOARD OF
PATENT APPEALS AND INTERFERENCES

In re Application of:

Sheppard

Serial No.: 09/747,529

Filed: December 22, 2000

For: JACQUARD WOVEN
TEXTILE WITH GRAPHIC
IMPRESSION AND A
METHOD OF MAKING THE
SAME

Group Art Unit: 1771

Examiner: Befumo, Jenna-Leigh

Appeal No.:

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

BRIEF OF APPELLANTS

This is an appeal from the non-final rejection of the Examiner dated October 4, 2004, rejecting Claims 21-36, all claims currently pending in the case. The Applicant files this Appeal under 37 C.F.R. § 41.31(a), having had all claims twice rejected. The requisite fee set forth in 37 C.F.R. § 41.20(b) was presented on December 23, 2004.

REAL PARTY IN INTEREST (37 C.F.R. § 41.37(c)(1)(i))

Inventor James M. Sheppard has assigned all his rights and interests in the current invention to Devant Ltd., a North Carolina Corporation. As such, Devant Ltd. is the real party in interest in this case. Mr. Sheppard is the President of Devant Ltd.

RELATED APPEALS AND INTERFERENCES (37 C.F.R. § 41.37(c)(1)(ii))

Applicant has previously presented the current claim set to the board in an Appeal Brief filed on April 23, 2003. In a decision dated July 29, 2004, the Board reversed the Examiner's previous rejection of the current claim set and affirmed the Applicant's position regarding the Examiner's rejection. A copy of the Board's decision is included in Appendix 3.

An appeal has also been filed for related Application Serial No. 09/837,094, entitled JACQUARD OR DOBBY WOVEN TEXTILE WITH GRAPHIC IMPRESSION AND A METHOD OF MAKING THE SAME, filed on April 18, 2001. A Notice of Appeal was filed on November 11, 2004. Applicant's Appeal brief was filed on the same date as this Brief.

STATUS OF CLAIMS (37 C.F.R. § 41.37(c)(1)(iii))

The application was filed on December 22, 2000, claiming priority under 37 C.F.R. § 1.78(a)(4) of U.S. Provisional Application No. 60/173,275 filed on December 28, 1999. The application was originally filed with 20 claims of which two (2) were independent claims (Claims 1, and 16).

All of the claims were rejected in the Examiner's first Office Action of October 4, 2002.

An Examiner interview was conducted on November 6, 2002, where the Examiner suggested changing the claims to product-by-process claims to more clearly define the structure of the finished product.

In Applicant's response dated November 18, 2002, all of the original claims 1-20 were cancelled, and new claims 21-36 were added in light of the Examiner's comments during the interview. Claims 21 and 29 were the only two independent claims that were added.

In the subsequent Office Action of January 23, 2003, which was made final, the Examiner rejected all claims 21-36.

On April 23, 2003, the Applicant filed a Notice of Appeal to the Board of Patent Appeals and Interferences, followed by an Appeal brief. In a decision dated July 29, 2004, the Board reversed the Examiner's rejection and affirmed the Applicant's position regarding the Examiner's rejection.

The Examiner then reopened prosecution, issuing the current Office Action on October 4, 2004, rejecting all claims 21-36.

The status of the claims is as set out in Examiner's Non-Final Rejection dated October 4, 2004, and is as follows:

Allowed claims—none

Claims objected to—none

Claims rejected—21-36.

STATUS OF AMENDMENTS (37 C.F.R. § 41.37(c)(1)(iv))

The Examiner issued a non-final Office Action on October 4, 2004. However, having had the claims more than twice rejected, Applicant has chosen to directly appeal the Office Action under 37 C.F.R. § 41.31(a).

SUMMARY OF CLAIMED SUBJECT MATTER (37 C.F.R. § 41.37(c)(1)(v))

In the weaving of terry toweling, three series of yarns are employed: (a) pile warp which produces the loops for the pile surface (b) ground warp from which the pile warp projects and (c) weft which binds the two warps together.

Jacquard weaving is a well-known process that can be employed for creating thick, luxurious pile textile items capable of having a velour or looped terry nap. This weaving process employs two different colors in the linear band of the warp filaments when fabricating the textile. See Specification, page 2 paragraph 3. Colors and patterns in a jacquard article are restricted to the two colors employed in a given linear direction of the woven article. Any pattern of color 1 that is woven into one side of the article with a background of color 2 is repeated on the reverse side of the article but with a reversed color scheme, i.e., a pattern of color 2 and a background of color 1. This limits the utility for these types of articles, since many designs and logos cannot be adequately reproduced within the confines of the jacquard two-color scheme.

Printing processes on jacquard fabrics have been limited to preprinting the warp filaments with an elongated vertical pattern such that when woven, a jacquard article with more than 2 colors can be achieved. This process requires elaborate computer controlled printing onto the filaments, and very precise monitoring of the weaving process. Printing a pattern post-weave on an article has been employed in non-jacquard situations, but this results in an article that is largely limited to a single color on the nonprinted side of the article. Printing on the reverse side of the non-jacquard article is largely prohibited due

to the likelihood that the separately printed images on opposite sides of the article will bleed through the article and disfigure the images on both printed sides. Post printing also has the undesirable side effect of decreasing the absorbency of the towel.

Applicant has recognized the deficiencies of both the jacquard weaving process, namely the limitation of a two-color scheme in a linear band, and the traditional printing process (wherein the finished article is limited to a single color in the unprinted area) and has created the novel “Edge® Towel.” This article employs jacquard weaving to create an article with a central light colored area, surrounded by a dark border. Due to the jacquard process, the reverse side of the article is a dark colored central area surrounded by a light colored border. A design can be positioned in the light colored central area of the first side. The dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the central area. This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process. Likewise, The dark central area on the reverse side of the article is capable of masking any potential bleed through of the design on the light colored central area of side one. This allows the applicant to apply the image so as to result in a graphic that is more intensely colored than woven articles that are limited to a single front and rear color.

Additionally, affixing a design on a jacquard article gave the unexpected result of producing an image that was more crisp and sharp than other towels. The inventor attributes this surprising result to the increased density of the pile loops on a jacquard article as compared to other woven articles. Thus, viewing an image on a jacquard fabric is not unlike watching high definition television: the picture is more clear and sharp than the picture available on the alternative.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

(37 C.F.R. § 41.37(c)(1)(vi))

The Examiner has rejected claims 21-36 under 35 U.S.C. §103(a) as being unpatentable over Hobson (4,259,994) in view of Carpenter et al. (5,983,952) and Sherrill et al. (3,721,273). This is the only rejection of the claims. Therefore, the issues to be decided in this appeal are the following:

1. It is the Examiner's position that the Hobson patent discloses a woven towel made from different color yarns that can be printed with a design pattern prior to weaving, and that the figures show different colored regions around the edges. The Examiner states that Carpenter et al. provides evidence that towels can be produced on different types of looms to produce decorative designs in the woven fabric by changing the weave pattern of the yarns, and that the woven structure can be combined with printed designs. Sherrill et al. is cited for disclosing the claimed woven design. From this, the Examiner concludes that it would have been obvious to one of ordinary skill in the art to create towels with a known design structure, as shown in Sherrill et al., by combining woven patterns with printed patterns as taught in Carpenter et al. in the fabric of Hobson to create towels with more intricate designs at a lower cost due to the use of print to create complex designs in the fabric.

2. The Examiner's position is that Applicant's declaration under 37 C.F.R. 1.132 is insufficient to overcome the rejection of claims 21-36 based upon Hobson and Carpenter et al. because the affidavit fails to provide hard evidence which established the claimed product fills a long felt need or resulted in commercial success.

ARGUMENT (37 C.F.R. § 41.37(c)(1)(vii))

Issue 1—The rejection of Claims 21-26 under 35 U.S.C. §103(a) as being unpatentable over Hobson (U.S. Pat. No. 4,259,994) in view of Carpenter et al. (U.S. Pat. No. 5,983,952) and Sherrill et al. (U.S. Pat. No. 3,721,273).

Hobson discloses printing on unwoven side-by-side yarns certain desired patterns in order to make two towels. The two towels are side-by-side on the loom. The looms produce a first towel with a floral pattern, and a second towel of the second color having the same floral pattern.¹ The color schemes can remain the same on the reverse side of each towel², or the reverse side can be ecru or bleached.³ Hobson does not teach using a Jacquard loom.

Carpenter et al. discloses applying a printed pattern to jacquard woven fabric. An elongated pattern is printed onto unwoven side-by-side yarns. Those yarns are then wound on a beam and then the beam is taken to a loom where the textile is woven. Precise control over the tension of the yarns is required to accurately reproduce the image preprinted on the yarns when the yarns are woven into the finished textile article.

Sherrill et al. discloses a terry towel having one face cotton terry, and the opposite face rayon terry. As can be seen in the Figures of Sherrill, the first side (Fig. 1) has printed thereon a central design, and an outer region having additional printed designs thereon. The second side (Fig. 2) is entirely of cotton terry without any designs.

The Examiner sets forth many of the features of Hobson, Carpenter et al., and Sherrill et al., and concludes that “it would have been obvious to one of ordinary skill in the art to create towels with a design structure, as shown in Sherrill et al., by combining woven patterns with printed patterns as taught in Carpenter et al., in the fabric of Hobson, which teaches creating towels with differed colored sections combined with printed patterns to create towels with more intricate designs at a lower cost due to the use of print to create a towel that is visually and texturally appealing due to the printed images, colors, and weave structure.” This rejection is respectfully traversed for the following reasons.

¹ U.S. Pat. No. 4,259,994 at col. 3, lines 33-35.

² Id. at col. 2, lines 23-25.

³ Id. at col. 2, lines 48-50.

Claims 21 and 29 are the independent claims. Attached Table 1 sets forth the elements of both claims 21 and 29 and views these with respect to the rejection of Hobson vs. Carpenter et al. vs. Sherrill et al. Claim 21 starts by calling for weaving a towel on a jacquard loom using at least 2 different colors. Hobson teaches away from using jacquard looms in column 2, line 18. Carpenter et al., on the other hand, have a jacquard loom as item 26. Sherrill et al. are silent as to the loom. It is unclear how the Examiner intends to combine these references since Hobson teaches away from using a jacquard loom; Carpenter teaches using a jacquard loom, and Sherrill is silent as to this feature. These teachings are like oil and water and are not meant to be mixed.

Issue 1a. CLAIM 21 (37 C.F.R. § 41.37(c)(1)(vii) subheading)

Claim 21 calls for a border having a first color that is woven adjacent each edge on one side of the towel. Neither Hobson, Carpenter, nor Sherrill has this feature. The Examiner notes that Hobson has a product which can have blue floral “borders” on one side and gold floral “borders” on the adjacent towel. However, these are not borders. These are merely stripes. A border is something that goes continuously around the entire edge of the product, as clearly set forth in Claim 21. Claim 21 states that the border is adjacent “each edge”. It is clear that the floral stripes of Hobson are only adjacent 2 edges, but are not adjacent the third and fourth edge of a two-dimensional product. Furthermore, there is no way one skilled in the art can modify Hobson or Carpenter and place a “border” on all edges without totally ignoring the teachings of these references. Sherrill et al. appears at first glance to have such a border, however, such is not the case. The Sherrill towel is woven such that the first side is entirely rayon terry, while the second side is entirely cotton terry. Therefore, the border of Sherrill as shown in Figure 1 is defined by a printed pattern (reference number 25). A printed border belies the Applicant’s invention, which requires a woven border for proper masking of misaligned and intense graphic printing.⁴

⁴ See Application as filed, Page 8, paragraph 2, and page 9, final paragraph.

Claim 21 continues by stating that a border having a second color is adjacent each edge of the towel on its other side. Again, neither Hobson nor Carpenter has this for the same reason set forth above, i.e., Hobson/Carpenter teaches stripes but not borders adjacent “each edge” of the towel. Sherrill et al. teach that the reverse side, as seen in Figure 2, is entirely of plain cotton terry. The Sherrill et al. towel is specifically manufactured so that the rayon terry piles are entirely on one side of the towel and the cotton terry piles are entirely on the other side.⁵ Sherrill et al. teach printing on the rayon fibers only, since they have an increased absorption for certain dyes, as is well known in the art. The printed pattern would therefore appear only on one side, the rayon side, of the towel. The reverse side of the towel, the cotton side, would not have the alternate color pattern as claimed and required by the Applicant.

Claim 21 continues by stating that the towel has a central area within the borders on both sides of the towel. While there is central area in any two-dimensional product, this central area claimed in Claim 21 must be within the borders. The lack of borders by both Hobson/Carpenter makes the location of the central area on the towel unclear to those skilled in the art. The Sherrill et al. towel has a central area on only one side of the towel.

Claim 21 continues by stating that the central area on one side is in a first color, while the central area on the other side is in a second color. Neither Hobson, Carpenter et al., nor Sherrill et al. teach that the color on a towel is such that the central area on a first side and the borders on the second side are of one color, while the central area of the second side and the borders of the first side are of a second color. This is how Devant sets up the Jacquard loom to make the Edge towel.

Lastly, Claim 21 calls for forming a graphic impression in the central area on one of the sides. Neither Hobson nor Carpenter forms a graphic impression in the central area of a woven product - Figure 1 of Sherrill et al. discloses this.

⁵ U.S. Pat. No. 3,721,273, col. 2, lines 52-59.

By utilizing the color scheme in claim 21, other objects of the invention can be achieved. This article employs jacquard weaving to create an article with a central light colored area, surrounded by a dark border. Due to the jacquard process, the reverse side of the article is a dark colored central area surrounded by a light colored border. A design can be printed in the light colored central area of the first side. The dark colored border surrounding the light central area is capable of masking any pattern that might overlap onto the border from the central area. This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process of Hobson and Carpenter. Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the design on the light colored central area of side one. This allows the applicant to apply the image so as to result in a graphic that is more intensely colored than woven articles that are limited to a single front and rear color. This scheme is present in claim 21, and is also further defined in claim 23, by calling for the general color scheme.

Issue 1b. CLAIM 23 (37 C.F.R. § 41.37(c)(1)(vii) subheading)

Claim 23 is separately patentable due to the further defined color scheme's increased effectiveness at masking bleed through and misalignment of applied images. None of the applied references disclose the claimed color scheme.

Issue 1c. CLAIM 29 (37 C.F.R. § 41.37(c)(1)(vii) subheading)

In considering Claim 29, it calls for a textile having edges adjacent its periphery. Each of Hobson, Carpenter, and Sherrill has this feature.

Claim 29 continues by calling for a textile having first and second sides and, again, each of Hobson, Carpenter, and Sherrill has this feature.

Claim 29 calls for each side having a border adjacent said edges and surrounding a central area. Neither Hobson nor Carpenter has borders surrounding each edge of the

towel and correspondingly, neither surround a central area. Sherrill et al. have an outer region having additional printed designs on only one side.

Claim 29 calls for the graphic impression to be positioned only within the central area on one side. Sherrill et al. discloses this in Figure 1.

The last two limitations of Claim 29 are with respect to the color of the border and the central area. Specifically, the border on the first side and the central area on the second side have a first color, while the central area on the first side and the border on the second side have a second color. Neither Hobson, Carpenter et al., nor Sherrill et al. teach these limitations.

By utilizing the color scheme in claim 29, other objects of the invention can be achieved. This article employs jacquard weaving to create an article with a central light colored area, surrounded by a dark border. Due to the jacquard process, the reverse side of the article is a dark colored central area surrounded by a light colored border. A design can be printed in the light colored central area of the first side. The dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the central area. This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process. Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the printed design on the light colored central area of side one. This allows the applicant to apply the printed image so as to result in a graphic that is more intensely colored than woven articles that are limited to a single front and rear color. This scheme is present in claim 29, and is also further defined in claim 31.

Issue 1. Conclusion (37 C.F.R. § 41.37(c)(1)(vii) subheading)

At the middle of page 5, the Examiner states what is well known in patent law that matters relating to ornamentation only which have no mechanical function, cannot be relied upon to patentably distinguish the claimed invention from the prior art. However,

the Examiner concludes that the only features of the present invention that deserve patentable weight include, the woven towel having different color yarns which create a first pattern on the first side and an inverse pattern on the reverse side, and a graphic impression, and states that each of these features are found solely within the Hobson reference. This bald conclusion only demonstrates that the Examiner has never understood, and still does not understand the technology of the present invention. As has been repeatedly stated, the dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the central area.⁶ This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process. Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the printed design on the light colored central area of side one.⁷

The Applicant finds it remarkable that the Examiner is now arguing that Hobson alone teaches every limitation in the claims that should receive weight in determining patentability. The Board has already stated that Hobson in view of Carpenter does not establish obviousness. The Applicant is therefore amiss as to how Hobson alone would do so.

Attached Table 1 sets forth the elements of both claims 21 and 29 and views these with respect to the rejection of Hobson, Carpenter, and Sherrill.

Issue 2—The Applicant's Rule 132 Declaration dated March 31, 2003, was submitted for establishing the commercial success of the "Edge® Towel" as indicia of nonobviousness. This declaration is attached hereto at Evidence Appendix 2, under 37 C.F.R. § 41.37(c)(1)(ix)

In the Board's decision of July 29, 2004, a decision was rendered solely on the basis that the Examiner's rejection did not establish prima facie obviousness. The Board,

⁶ See Application as filed, page 9, final paragraph.

⁷ See Application as filed, Page 8, paragraph 2.

therefore, did not comment on the applicability of the Applicant's submitted Declaration. The Declaration is resubmitted for consideration.

The data and statements set forth in the Declaration supplied the Examiner with confidential and commercially sacred information concerning the sales of the Edge towel. From that it can be seen that in less than 3 years time, the Edge towel came to account for over 25% of Applicant's total revenue and over 20% of total pieces sold, while never accounting for more than 1% of Applicant's total products. Additionally in the Declaration, Applicant submitted two letters that were written to industry competitors persuading them in light of this application to cease production of towels that were copied from Edge articles.

On page 2, paragraph 3 of the Final Rejection, the Examiner states that the Affidavit under 37 C.F.R. 1.132 is insufficient to overcome the rejection because the Affidavit fails to provide hard evidence which established the claimed product fills a long felt need or resulted in commercial success. The Examiner makes a number of statements in responding to the Amendment that bridge pages 2 and 3 of the Office Action. These statements will be addressed one at a time, as set forth hereinafter.

The Examiner's first statement is, "while the Applicant sets forth multiple statements related to the product's success and the Applicant's opinion why the product fills a long felt need, the Applicant fails to include any factual evidence which supports these statements."

First, why should actual evidence be needed? The Inventor has provided the original affidavit, which was notarized, and clearly stated therein that the Edge towel has enjoyed commercial success. If the Inventor lied, thus committing Fraud on the Patent Office, the entire patent would be unenforceable. With this penalty in mind, the Inventor only made truthful statements. Is providing the Patent Office with factual data more probative evidence than the Inventor's own statements? Not according to *In re Tiffin and Erdman* cited in the remarks of Applicant's Response of November 20, 2002. With

over 200 years of legal history in the U. S., it is clear that courts highly favor actual testimony, such as Affidavits, over raw factual data. Nevertheless, in spite of the above explanation, a Supplemental Affidavit supplying confidential sales and financial figures related to the Edge towel, as well as letters and various correspondence from competitors who clearly would like to, or have tried to knock off the present invention was submitted to the Examiner, and is now part of the record.

In the next paragraph on page 2 of the Office Action, the Examiner states that Applicant needs to produce evidence such as market share or other factual evidence that would show how the towel has succeeded versus all competitors. The Examiner states that there is no evidence to show how successful the product has been in the market as compared to all competitors in the field. First, the U.S. towel industry is small. There is no trade association that can legally provide sales figures in the relevant industry. The textile market itself does have a trade association, but it has no subgroup for towels. If Devant solicited sales data from its competitors, this would be an antitrust violation. And because no one wants to be involved in an antitrust violation, no one will provide such figures.

Second, the Examiner should know that the textile market did poorly in 2001 and 2002, as compared to 2000 (for sometime, the U.S. textile market has been relocating south of the border and to Asia due to cheaper production costs). Devant was no exception as its sales dropped 11.5%. On the other hand, the number of Edge products produced and sold increased greater than 5 times during this same period, and the same is true for its dollar sales figure. Assuming that all other competitors had down years, as Devant did, data submitted herewith clearly shows that sales of the Edge towel was growing.

The Examiner further states that Applicant bears the burden of proof of establishing a nexus between the claimed invention and evidence of commercial success and that the success is due to the claimed invention. Other than the broad general statement, the Examiner has offered no specific and detailed comments that the Applicant

has not already established the nexus between the claimed invention and the evidence of commercial success. The bear proof of this lies in the fact that the claims are narrow and specific to the Edge towel. The Edge towel covers each of the types of Edge towels set forth in the Supplemental Affidavit of success. The original Affidavit of success set forth the fact that it was created due to the inability and limitations of the jacquard process. Specifically, the original Affidavit says that by weaving a jacquard woven perimeter and having a graphic impression added to the towel overcomes the prior obstacles of being able to use a limited number of colors in a linear band in a woven graphic impression. This and other limitations in the claims are the nexus.

Lack of any specific deficiencies listed by the Examiner is indicative of the fact that the Examiner must believe that the claimed invention and the evidence of commercial success are satisfactorily entwined.

In the sentence bridging pages 2 and 3 of the Office Action, the Examiner states that *Applicant's statement that the claimed subject matter solved the problem that was long standing in the art, while on the other hand lacking a showing that others of ordinary skill in the art were working on the problem and if so, for how long* is perhaps best answered by the Supplemental Affidavit previously submitted to the Examiner. While the Supplemental Affidavit does not state that others were working on this problem or that they even recognize the problem, the fact that the Edge towel has had so much commercial success, and in particular the fact that its sales have increased more than 5 fold in the years 2000 – 2002 indicate that the marketplace recognize the superior product and that there was a long felt need for this. The lack of evidence relative to what others of ordinary skill in the art were doing is only one of many factors the Examiner should consider in evaluating commercial success. If many other factors are present, and this one factor is not present, this does not demonstrate that there is a lack of commercial success. Nowhere in the MPEP, nor in any case law is there an explanation as to what factors are minimally required for proving commercial success. Instead, the courts recognize, and the MPEP supports such, by suggesting that there are many factors which one can consider when evaluating commercial success.

The first full sentence atop page 3 of the Office Action, the Examiner says that there is no evidence that those skilled in the art knew of the teachings of the above-cited references and that they were still unable to solve the problem. On the other hand, there is no reason to suggest that they did not know of the prior art. And yet, the present Inventor created the Edge towel. As set forth below relative to the rejections, it is submitted that even if those skilled in the art knew of the teachings of the cited reference they would still not arrive at the claimed invention because the cited references do not disclose all the elements of the claimed invention. "Knowing the cited references" would not help those skilled in the art relative to the present invention.

On page 3, the Examiner states that evidence of infringement can be used to establish the long felt need was present in the marketplace. The Examiner states that Applicant has submitted no evidence detailing competitors trying to copy the invention. With the introduction of the Supplemental Affidavit, evidence is submitted to provide these details. As set forth in the Supplemental Affidavit, two of Devant's biggest competitors have copied the Edge towel, but were persuaded to stop because of this patent application. The first event was noted at the PGA (Professional Golf Association) show in early 2001 where Tommy Hilfiger voluntarily pulled its product on the first day of the show, after speaking with the Inventor about the Edge towel. The second event was the result of a conversation discussing Admanco's towel, and their voluntary agreement not to sell their knock-off towel.

Accordingly it is submitted that the Rule 132 Declarations provide convincing evidence of the unobviousness of the invention.

Respectfully submitted,



Gregory N. Clements

Attorney for Applicants

Registration No. 30,713

DOUGHERTY, CLEMENTS, HOFER & BERNARD

1901 Roxborough Road, Suite 300

Charlotte, North Carolina 28211

Telephone: (704) 366-6642

Facsimile: (704) 366-9744

Attorney Docket 2827

TABLE 1

Claim 21	Hobson v. Carpenter v. Sherrill
Weaving a towel on a Jacquard loom using at least 2 different colors.	Hobson teaches away from Jacquard loom, col. 2, line 18
	Carpenter has Jacquard loom item 26
	Sherrill does not disclose weaving loom.
Such that a border having a 1 st color is woven adj. each edge on one side thereof.	Neither Hobson nor Carpenter has this. Sherrill has a border defined by printing.
And a border having a second color is woven adj. each edge of said towel on the other side.	Neither Hobson nor Carpenter nor Sherrill has this.
Said towel having a central area woven within the borders on both sides.	There is a central area but no borders. Sherrill has a central area on only one side.
Said central area on other side is woven with 1 st color.	There is a central area but no borders.
Said central on said one side is woven in a 2 nd color.	There is a central area but no borders. Sherrill's border is same color as central area.
Forming a graphic impression in said central area on said one side.	Neither Hobson nor Carpenter has this. Sherrill discloses this.
Claims 22 – 28 not disclosed by Hobson & Carpenter.	Claim 28 – Hobson mentions shearing (Col. 2, line 33) not blooming. Sherrill discloses this.

TABLE 1 (*continued*)

Claim 29	Hobson v. Carpenter v. Sherrill
A textile having edges adjacent its periphery.	Both have this.
Said textile having 1 st and 2 nd side.	Both have this.
Each side having a border adj. said edges and surrounding a central area.	Hobson and Carpenter do not have this. Hobson has side edges not borders. Sherrill has this.
Graphic impression being positioned only within central area on 1 st side.	None have this.
Said border on 1 st side & central area on 2 nd side having a 1 st color.	None has this.
Said centered areas on said 1 st side & said border on said 2 nd side having a 2 nd color.	None has this.

CLAIMS APPENDIX (37 C.F.R. § 41.37(c)(1)(viii))

The claims on appeal appear as follows:

21. A towel having a graphic impression , comprising: weaving a towel on a jacquard loom using at least two different colors of yarn, such that a border having a first color is woven adjacent each edge of said towel, on one side thereof, and a border having a second color is woven adjacent each edge of said towel on the other side, said towel having a central area woven within said borders on both said one side and said other side, said central area is woven with said first color on said other side, said central area is woven with said second color on said one side, and forming a graphic impression in said central area on said one side.
22. The product of claim 21, wherein said forming is by screen printing, image dyeing, digital imaging, or heat transferring.
23. The product of claim 21, wherein said border on said one side and said central area on said other side having said woven first color is a dark color, whereas said border on said other side and said central area on said one side is a light color.
24. The product of claim 23, wherein said graphic impression has at least two different colors, neither being said first nor said second color.
25. The product of claim 23, wherein said border shape is selected from the class of rectangular shape, circular shape, oval shape, square shape, and irregular shape.

26. The product of claim 25, wherein said border is solid or a pattern.
27. The product of claim 26, wherein said pattern is selected from the class consisting of stripes, dots, names, silhouettes of sport players, animal shapes, corporate logos, or university mascots.
28. The product of claim 21, wherein said towel is sheared and bloomed.
29. A textile having a graphic impression; said textile having edges about its periphery; said textile having first and second sides; each side having a border adjacent said edges and surrounding a central area; said graphic impression being only positioned within said central area on said first side; said border on said first side and said central area on said second side having a first color; and said central area on said first side and said border on said second side having a second color.
30. The textile of claim 29, wherein said textile is a towel.
31. The textile of claim 30, wherein said first color is a dark color border and said second color is a light color.
32. The textile of claim 30, wherein said border shape is selected from the class of rectangular shape, circular shape, oval shape, square shape, and irregular shape.

- 33. The textile of claim 30, wherein said border is solid or a pattern.
- 34. The textile of claim 33, wherein said pattern is selected from the class consisting of stripes, dots, names, silhouettes of sport players, animal shapes, corporate logos, or university mascots.
- 35. The textile of claim 29, wherein said textile is sheared and bloomed.
- 36. The textile of claim 30, wherein said towels are selected from the class of a bath towel, beach towel, kitchen towel, or a sport towel.

EVIDENCE APPENDIX (37 C.F.R. § 41.37(c)(1)(ix))

1. Attached hereto are copies of the Applicant's Rule 132 Declaration dated November 14, 2002 and Supplemental Declaration dated March 31, 2003, that were submitted for establishing the commercial success of the "Edge® Towel" as indicia of nonobviousness.



IN THE UNITED STATES PATENT OFFICE

Rick Sheppard

Serial No.: 09/747,529

Filed: December 22, 2000

JACQUARD WOVEN TEXTILE WITH GRAPHIC IMPRESSION AND A METHOD OF MAKING THE SAME

Supplemental Affidavit under 37 C.F.R. 1.132

State of North Carolina

County of Union

I, Rick Sheppard, being duly sworn, depose and say that I'm president of Devant Limited and have been wholly employed there since 1977. I'm also the inventor of the above identified invention commercially known as the Edge® towel.

As stated in my earlier Affidavit, Devant is the leading manufacturer of Golf Towels in the United States and the Assignee of the Edge towel. In my earlier Affidavit I state what the Edge towel is and why I believe it is so immensely successful. Those things that are believed to contribute to its success in the marketplace are described and claimed in the present application noted above.

In addition to the statements in my earlier Affidavit, I hereby supply the following confidential and commercially sacred information concerning the sales of the Edge towel.

The Edge towel was first introduced in year 2000 and there were 3 types, namely: 1) the Edge Hand towel, 2) the Edge Pro towel, and 3) the Edge Beach towel. Starting in 2001 and continuing to 2002, the Tournament Edge towel was added to the mix. Although the Edge towel never accounted for more than 1% of all Devant's products, they account for 3.4%, 15% and 21.3% of the total pieces sold and respectively account for 4.3%, 19.8% and 25.6% of the total revenue for the years 2000, 2001, and 2002. It is clear that the Edge towel is quickly becoming 50% of the sales of all Devant products and has a greater margin of profitability than the remaining products. The information for years 2000, 2001, and 2002 are set forth on the attachment. This Affidavit sets forth the commercial success that this product has enjoyed since its infancy and continues through today.

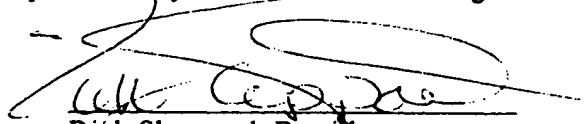
As additional evidence of commercial success, copying of the invention by competitors is a significant factor. As evidence of copying, attached as Exhibits A and B, are letters to and from competitors who have copied the Edge towel.

In early 2001 Devant attended the big PGA show in Las Vegas. Just before the doors opened for the show, I walked past the Tommy Hilfiger booth and knock-off Edge towels were displayed. I immediately sought and discussed this with David Leveille, a long time professional colleague, and explained that the Edge towel is unique to Devant.

Additionally I told him of the filed patent application and asked him to pull the knock-off Edge towels from the booth and not to produce them. David agreed to this. Exhibit A is my follow up letter expressing my sincere thanks, but also enforcing the importance of this product to Devant.

During the first quarter of 2002, I learned that Admanco was knocking-off the Edge towel. I called Christopher Bumby, President and CEO and spoke with him about Admanco's potential infringing activities. Exhibit B is Christopher Bumby's reply letter to me acknowledging that no further copying will occur.

Competitors are often asking what is the status of the patent. Competitors recognize the long felt need for the product and have attempted to copy it. "Copying is the best form of flattery." It demonstrates what a combination of references by the Examiner cannot demonstrate – that the marketplace recognizes the value of the Edge towel. Evidence of this nature is even more persuasive of patentability than sales and viewing market shares.



Rick Sheppard, President

From this 31 day of March, before me personally appeared Rick Sheppard, known to be the individual described herein and who executed the foregoing instrument and who thereupon acknowledged to me that he executed the same for the purposes set forth herein.

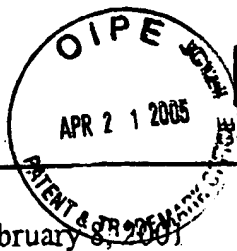
Witness my hand and official seal, this 31 day of March 2003.

(Official Seal)



Notary Public

My Commission Expires October 2, 2005



February 8, 2001

Tommy Hilfiger
Dave Leveille
25 West 39th Street-14th Fl.
New York, NY. 10018

Dear David,

It was great to see you at the recent PGA show my only regret was that our meeting was under an awkward circumstance. I appreciate your quick response to our concern by pulling product which may potentially infringe on a recent pending Devant patent.

Our broad claim in this patent seeks protection utilizing graphic impression (such as image dyeing, screen printing, heat transfer, or digital imaging) in conjunction with the jacquard woven process. In addition to this broad claim we have filed a dozen narrowed claims. Extensive research leads us to think this patent has an excellent chance to issue. I have enclosed a recent copy of our catalogue for your perusal and have attached the name and phone number of our lead consul on this project should your legal department have further questions.

Regarding the disposition of existing product I would like to make two suggestions:

- 1) Sell any current product through European or Asian outlets-(This year the U.S. and Canada is our primary concern. We will not begin distributing outside of the U.S. until much later this year.)
- 2) Your Current product can be easily changed in future runs by jacquard weaving the name instead of printing to prevent future potential infringement.

David, we've been friends for many years and while this is an awkward situation I'm certain that you will handle this in professional manner which you have demonstrated in our discussion at the PGA show and all our interactions of the past. I believe this patent pending may represent one the most exciting accomplishments for Devant in the past twenty-six years and is the result of many years of research and development.

Thank you again for the way you handled my concerns during the PGA show and please let me know if you need anything else to help resolve this matter. Best wishes to you and your family and hope you have a great year in 2001.

Sincerely,

Rick Sheppard,
President



CLOTH PROMOTIONAL PRODUCTS SINCE 1922

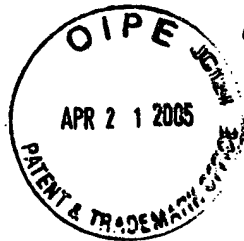


Exhibit B

RECEIVED

MAR 15 2002

March 3, 2002

Mr. Rick Sheppard
DEVANT LTD
3011 Walkup Ave.
Monroe, NC 28110

Dear Rick,

This letter serves to confirm our conversations regarding The Edge Towel and the DEVANT LTD pending patent on the process of screen-printing or other imprinting of a jacquard woven towel.

Admanco, Inc. agrees that we will not sell the imported version of the windowpane design jacquard woven towel with any other decoration process other than embroidery. Furthermore, we will notify every distributor of Admanco, Inc. when they inquire about the towel of the pending patent and that the only way this towel can be sold is with an embroidered logo or copy. In addition, all future literature published with this towel included will not show or reference any screen-printing options.

I wish you a successful granting of your patent as I see you have been waiting several years, and continued success with DEVANT LTD and Carolina Sport Towels. I look forward to meeting you in person soon at an upcoming show.

Sincerely,

Cristopher W. Bumby, CAS
President & CEO



IN THE UNITED STATES PATENT OFFICE

Rick Sheppard

Serial No.: 09/747,529

Filed: December 22, 2000

JACQUARD WOVEN TEXTILE WITH GRAPHIC IMPRESSION AND A
METHOD OF MAKING THE SAME

Affidavit under 37 C.F.R. 1.132

State of North Carolina

County of Union

I, Rick Sheppard, being duly sworn, depose and say that I'm president of Devant Limited and have been wholly employed there since 1977. I'm also the inventor of the above identified invention commercially known as the Edge® towel.

Devant is the leading manufacturer of golf towels in the United States and the assignee of the Edge towel.

The Edge towel was created due to the inability and limitations of the jacquard process to produce multiple color logos on jacquard woven golf towels. Jacquard woven golf towels allow only two colors in any linear direction to be chosen. This limits logo reproduction where logos may have four or five colors in a single linear area. By weaving a jacquard woven perimeter or frame for the towel a graphic impression may be added utilizing full-color graphics for the logo. This gives the impression of a jacquard woven golf towel utilizing full color reproduction in the center of the towel yet retains the quality and look of an expensive jacquard woven golf towel.

The Edge towel combines the look of jacquard weaving with the process called image dying so it is difficult to tell how the multicolor jacquard woven product is produced. It is the combination of two separate processes that gives the towel the woven look, yet all of the color potential of a graphic imaged product.

This product has been immensely successful and in three short years it now dominates 50 percent of total production, competing with 300 other

different products in the Devant line including jacquard woven and image dyed products.

Background information

Devant has been producing golf towels for over 27 years and is the only manufacturer in the world that has the capacity to perform the three methods of towel decoration, namely jacquard weaving with image dying, printing, or embroidery. Over the years customers have expressed frustration over the inability of any company to produce their logo correctly using the expensive look of the jacquard weaving method and frustration over the lack of quality using the image dying or screen method. Historically jacquard woven towels are the most expensive towels to produce, and image dyed or printed towels are historically the least expensive way to decorate. I believe that the reason no one has ever combine these two processes together in the past is because applying an inexpensive method of decoration to the most expensive decorating process did not make good sense. Jacquard weaving is the most expensive weaving process known. Accordingly, jacquard woven towels are very high-end, luxurious and plush. This limits their marketability. Why would anyone add further cost to a high cost towel by applying a graphic image? Applying a graphic image would theoretically cheapen the value of the towel. No one has thought to add more cost to jacquard woven that in turn reduces its value. How would one market such a product? The unexpected benefit came when this was done and the graphic image was more crisp and sharp than other towels. Perhaps the plushness of the jacquard woven towel means you have more pile loops, those loops are sheared more evenly (a tighter weave shears more evenly) and, like increasing pixels for a computer monitor, the clarity and sharpness are increased. This was truly unexpected. Prior to the Edge towel there has been no other product that accomplished logo reproduction like this product.

Another benefit of jacquard woven towels of my invention is that precision alignment of these images within the central area is not a problem (see the small Pinehurst 2005 towel left with the Examiner). The text or smaller graphics are merely overprinted on the dark border and are not readily visible. Overprinting on the dark border eliminates alignment problems.

Commercial success

Beginning with this first introduction three years ago the Edge towel has been a huge commercial success for Devant Limited. In fact the product was so successful that in eight months one of the largest apparel companies in the world attempted to knock off the product. Numerous towel competitors have asked some of our resources to reproduce the style and our resources have refused, respecting Devant's concept, creativity, and patent pending nature of the Edge towel. This product is nothing short of revolutionary to the golf and sport towel market and sales have substantiated this. The most common question I have heard is how do we weave multiple colors into the towel when no one else can achieve this on a loom. The towel appears to be woven yet it is a hybrid, combining two processes to achieve a third totally different look never seen before the introduction of this product. Essentially the Edge product gives unlimited color and design freedom to a jacquard woven towel. I believe this reinforces the fact that this is not an obvious invention. Because graphic imaging is done after the towel is completely finished, there is no conflict with any prior patent applications which have sought to protect imaging or printing the yarn prior to the weaving process. We still have not realized the full potential of the Edge towel from a sales standpoint as our sales are still climbing without any end in sight.

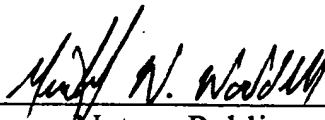
In my opinion the commercial success that we've enjoyed in bringing the Edge towel to market is primarily attributable to the uniqueness of the product and the fact that it fills a void that no other towel has accomplished. It is interesting to note that this towel has had virtually no advertising other than mere display at national trade shows. Because of this fact, I believe the product is commercially successful because customers appreciate the look and feel, and the fact that it produces their logo better than any other golf or sport towel on the market. Additionally when presenting this product to our customers we are asked to explain each time how we achieved multiple colors in a non-linear fashion on a jacquard woven product. We haven't had a customer who has been able to figure out how we have produced this product which I believe contributes to its uniqueness and is an indication of the nonobviousness of the invention.


Rick Sheppard, President

From this 14th day of November before me personally appeared Rick Sheppard, known to me to be the individual described in and who executed the foregoing instrument, and who thereupon acknowledged to me that he executed the same for the purposes therein set forth.

Witness my hand and official seal, this the 14 day of November, 2002.

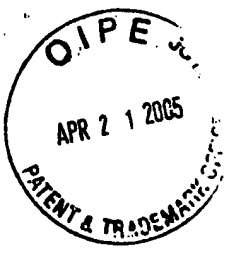
(Official Seal)


Notary Public

My Commission Expires October 2, 2005

RELATED PROCEEDINGS APPENDIX (37 C.F.R. § 41.37(c)(1)(x))

1. Attached hereto is a copy of the Board of Patent Appeals and Interferences' decision dated July 29, 2004, reversing the Examiner's previous rejection of the current claim set and affirming the Applicant's position regarding the Examiner's rejection.



The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES M. SHEPPARD, JR.

Appeal No. 2004-1029
Application No. 09/747,529

HEARD: July 14, 2004

MAILED

JUL 29 2004

PAT. & T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Before FRANKFORT, MCQUADE, and BAHR, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 21 through 36, all of the claims remaining in this application. Claims 1 through 20 have been canceled.

As noted on page 1 of the specification, appellant's invention relates to both a textile article and a method of making the textile article, wherein the textile article is a two-sided Jacquard woven textile product (e.g., a towel) with a

Appeal No. 2004-1029
Application No. 09/747,529

graphic impression on at least one side thereof. The method of making the article as described in the specification comprises the steps of a) providing a two-sided Jacquard woven textile wherein the front side of the textile or towel has, for example, a dark color border adjacent each edge and a light color area within the borders, while the reverse side has a light color border adjacent each edge and a dark color area within and surrounded by the borders, and b) subsequently transferring a graphic impression onto the towel, preferably in the light color central area of the front side, by screen printing, image dyeing, digital imaging, or heat transferring. Independent claims 21 and 29 are representative of the subject matter on appeal and a copy of those claims can be found, respectively, in the Appendix to the examiner's answer and the Appendix to appellant's brief.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Hobson	4,259,994	Apr. 7, 1981
Carpenter et al. (Carpenter)	5,983,952	Nov. 16, 1999

Claims 21 through 36 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hobson in view of Carpenter.

Appeal No. 2004-1029
Application No. 09/747,529

Rather than reiterate the conflicting viewpoints advanced by the examiner and appellant regarding the above-noted rejection, we refer to the examiner's answer (mailed August 27, 2003) and to appellant's brief (filed June 25, 2003) and reply brief (filed October 6, 2003) for a full exposition thereof.

OPINION

Having carefully reviewed the obviousness issue raised in this appeal in light of the record before us, we have come to the conclusion that the examiner's rejection of claims 21 through 36 under 35 U.S.C. § 103 will not be sustained. Our reasoning in support of this determination follows.

After a careful evaluation of the teachings and suggestions to be derived by one of ordinary skill in the art from the patterned terry fabric and its method of manufacture on a tappet or dobby mechanism as described in Hobson, and the Jacquard weaving system and method set forth in Carpenter for ensuring automatic alignment of a printed pattern with a woven pattern on a textile fabric as that fabric is being formed, it is our opinion that the examiner has failed to meet her burden of

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Application No. 09/747,529

establishing a *prima facie* case of obviousness. More particularly, we are of the view that the examiner's reasoning in support of the obviousness rejection before us on appeal (as expressed on pages 3-7 of the answer) is based almost entirely on speculation and conjecture, and with regard to the basic structure and color scheme of the towel defined in appellant's claim 21 and the textile of claim 29 on appeal, relies entirely upon appellant's own disclosure and teachings to supply that which is lacking in the applied prior art references.

Basically, we share appellant's views as aptly expressed in the brief and reply brief concerning the examiner's attempted combination of the Hobson and Carpenter patents, the failure of either Hobson or Carpenter to disclose borders adjacent each edge of a towel or textile product and a central area within and surrounded by the borders, which central area on one side of the towel or textile product receives a graphic impression, and the failure of either of the applied patents to teach or suggest the particular color arrangement of the borders and central areas required in the claims on appeal. We are also in agreement with appellant concerning the examiner's bald conclusion that "it would have been obvious to one of ordinary skill in the art to

Appeal No. 2004-1029
Application No. 09/747,529

choose various printed designs, as well as choose where to place the printed image on the Hobson product . . ." (answer, pages 3-4), so as to result in a towel or textile like that claimed by appellant. Since neither the applied references nor the examiner provides an adequate factual basis to establish that the towel of claim 21 on appeal or the textile product of appellant's claim 29 would have been obvious to one of ordinary skill in the art at the time of appellant's invention, it follows that we will not sustain the examiner's rejection of those claims under 35 U.S.C. § 103(a).

In addition, we note that the examiner's rejection of claims 22 through 28 and 30 through 36 under 35 U.S.C. § 103(a) based on the combination of Hobson and Carpenter, which claims respectively depend from independent claims 21 and 29, will likewise not be sustained.

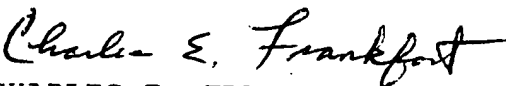
Since we have determined that the examiner has failed to establish a prima facie case of obviousness with regard to the claimed subject matter before us on appeal, we find it unnecessary to comment on appellant's evidence of secondary


Appeal No. 2004-1029
Application No. 09/747,529

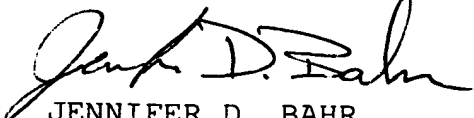
considerations relating to commercial success, long felt need and copying by others.

The decision of the examiner to reject claims 21 through 36 under 35 U.S.C. § 103(a) is reversed.

REVERSED


CHARLES E. FRANKFORT
Administrative Patent Judge


JOHN P. MCQUADE
Administrative Patent Judge


JENNIFER D. BAHR
Administrative Patent Judge

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CEF/lbg

Appeal No. 2004-1029
Application No. 09/747,529

DOUGHERTY & CLEMENTS & HOFER
SUITE 300
1901 ROXBOROUGH ROAD
CHARLOTTE, NC 28210

RECEIVED

AUG 02 2004

DOUGHERTY CLEMENTS & HOFER